

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Connect America Fund)	
Rural Broadband Experiments)	WC Doc. No. 14-259
)	
Rural Broadband Services Corporation, Inc.)	
Request for Waiver of Requirement for Letter)	WC Doc. No. 10-90
of Credit)	

**Request for Waiver of Requirement for
Letter of Credit**

Rural Broadband Services Corporation, Inc. (“RBSC”), by counsel, requests waiver of the requirement that provisionally selected bidders for Rural Broadband Experiment funding provide a letter of credit (“LOC”) in the post selection review process.¹ In support of its request the following is shown.

I Introduction and Background

RBSC’s proposal for Rural Broadband Experiment (“RBE”) funding described its intent to expand its service offerings to the Tribal Lands within five counties in northeastern Oklahoma, including the Cherokee “anchor” institutions. RBSC, a small Minority Business Enterprise, stated it could provide service meeting the Category 1 requirements upon an award of CAF support approximately \$42 million less than that which the Price Cap Local Exchange Carrier would be entitled to for the same area in model based support. RBSC’s application stated, however, that it expected to request waivers of the requirements for three years of audited

¹ Public Notice DA 14-1772, released December 5, 2014, Attachment B, p. 4.

financials and the LOC requirement.² The request for waiver of the audited financials requirement was filed December 18, 2014.³ After unsuccessful attempts to obtain a bank commitment for a LOC meeting the Commission's criteria, RBSC now requests waiver of that requirement as well and acceptance of RBSC's proposed alternatives to ensure the support provided will result in the provision of the high speed broadband services on Tribal lands in a financially sound and responsible manner.

The *Transformation Order* adopted a rule requiring winning bidders in the Mobility Fund auction to provide an irrevocable Letter of Credit.⁴ The *Rural Broadband Experiments Order* also adopted a LOC requirement.⁵ The stated purpose of the LOC requirement is to allow the Commission to immediately reclaim support if the recipient is not using the funds to further the objectives of universal service and to minimize the possibility that the support will become the property of a recipient's bankruptcy estate for an extended period of time.⁶

² In a meeting with Commission staff prior to the application, RBSC explained that as a start-up it could not provide three years of audited financial statements and that obtaining a letter of credit would not be financially feasible. Letter to Marlene H. Dortch, FCC, from Gerald J. Duffy, WTA Regulatory Counsel, Aug. 1, 2014. RBSC incurred the substantial expense of preparing and filing its application despite the impossibility of an enterprise with less than one year of operations filing three years of financial statements in reliance on the Commission's statements seeking innovative solutions and the Frequently Asked Questions paper posted on the Commission's website stating that newly-formed entities "should file for a waiver of this requirement after it has been designated a winning bidder." The FAQ also stated such waivers would be considered on a "case by case basis." Nevertheless, on January 30, 2015 the Bureau denied all of the pending waivers of the audited financial statements requirement, without individual consideration. Wireline Competition Bureau, Order, DA 15-139. RBSC will timely file an Application for Review of this Order.

³ Public Notice, Wireline Competition Bureau Announces Availability of Additional Funding for Rural Broadband Experiments; Seeks Comment on Waiver Petitions of Provisionally Selected Bidders. RBSC filed Reply Comments on January 13, 2015

⁴ 26 FCC Rcd, 17663, 17810-13 (2011).

⁵ 29 FCC Rcd 8769, 8788-93 (2014). (*"Experiments Order"*).

⁶ *Id.* at 8788.

The *Experiments Order* also recognized a need for greater flexibility regarding LOCs for Tribally-owned or –controlled winning bidders willing to build infrastructure and provide services on Tribal Lands. The Commission agreed to entertain waiver requests of the LOC requirement from such bidders that are unable to obtain a LOC upon showings that the bidder is unable to collateralize real estate; that the support will be used for its intended purpose, will be used in the best interests of the Tribal Nation, and will not be wasted.⁷

RBSC made inquiries to a top-one hundred commercial bank and to CoBank, but found that it was simply not possible to obtain a LOC meeting the Commission’s requirements unless it provided cash collateral in the full amount of the LOC.⁸ That requirement was both infeasible for RBSC as well as inconsistent with the purpose of Universal Service support because it would, in effect, require RBSC to maintain in cash an amount equal to all the CAF support funds effectively making them unavailable to support provision of broadband services.

The United Keetoowah Band of Cherokee Indians in Oklahoma (“UKB Cherokee”) has members and anchor institutions throughout the Tribal lands constituting the proposed service area and thus will be a major beneficiary of the broadband services.⁹ UKB Cherokee, however,

⁷ *Id.* at 8792, paras 67, 68.

⁸ Following the Commission’s Public Notice that it was considering whether the National Rural Utilities Cooperative Finance Corporation (“CFC”) should be eligible to issue letters of credit for RBE selectee’s, Jan. 23, 2015, DA 15-106, RBSC representatives asked CFC whether, if approved, it would consider issuing an LOC to RBSC. The reply was that it would not.

⁹ The Cherokees living in the proposed Tribal Lands service area to which they were relocated in the 19th Century are organized into two separate entities: the UKB Cherokee and the Cherokee Nation. UKB is a federally recognized band of Indians incorporated under the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967, 25 U.S.C. 501 *et seq.*). Within the corporate charter of UKB are the following purposes:

“*I(b) To advance the standard of living of the Band through the development of its resources, the acquisition of land, the preservation of existing landholdings, the better utilization of land ...*”

I(c) To promote in any other way the general welfare of the Indians of the United Keetoowah Band of Cherokee Indians in Oklahoma.”

also cannot obtain a LOC because its corporate charter prohibits mortgaging its land.¹⁰ In order to maximize both the resources available for construction and operation of the broadband network and ensure benefits of broadband services to all users on the tribal lands, RBSC and UKB Cherokee have entered into an agreement which establishes UKB Cherokee control over major aspects of the construction and operation of the broadband facilities described in the application. Specifically, the agreement provides in pertinent part that:

UKB will be responsible for program management, procuring equipment and supplies for construction of the network. It will also manage the ongoing customer and network operations of RBSC to ensure the needs of the tribe are incorporated in developing and implementing RBSC business plans. More specifically, UKB will manage the provision of services to commercial accounts and its tribal membership throughout the 5-county area, as communications facilities are completed, to comply with the FCC RBE voice and broadband service criteria. UKB will also manage the maintenance of the network to ensure continued delivery of reliable, high-quality services.

RBSC's intent, subject to further agreement with UKB Cherokee is that after the support period has ended (ten years) and personnel of UKB Cherokee have completed training on all operational elements of the Network, that RBSC will transition complete control of the Network on Tribal lands to the UKB Cherokee.

In view of the unique circumstances of the proposed service agreement and the substantial immediate and long term benefits to the tribe, RBSC requests that it be considered a Tribally-controlled entity for the purposes of eligibility to request a waiver of the LOC requirement pursuant to paragraphs 67 and 68 of the *Experiments Order*. The agreement between the UKB Cherokee and RBSC is not likely to be duplicated in other situations either in

U.S. Dept. of Int., Bur. Indian Affairs, Corporate Charter of United Keetoowah Band of Cherokee Indians, Oklahoma, Ratified Oct. 3, 1950

¹⁰ *Id.* At 4(a) ("No land belonging to the Band or interest in land shall ever be sold or mortgaged.").

the one-time RBE program or in the upcoming general bidding for CAF support. The agreement is consistent with the purposes set forth in several Commission decisions including the most recent *Experiments Order*. The Commission has consistently recognized that Tribal lands are among those most in need of advanced broadband services. Particularly in the context of an experiments program, it should recognize that there are legitimately multiple avenues to address the problem and accept this waiver request. [

II RBSC's Proposal Is Financially Viable, Will Not Waste CA Funds, and Will Provide Substantial Benefits to Subscribers on Tribal Lands

- A. The financial projections underlying RBSC's proposal are sound and RBSC has the financial support of its Equity Partner

RBSC's financial projections, as provided in its Forms 5610 and 5620 filings, show that its proposal will provide high quality service at the Category 1 level on Tribal Lands at a cost substantially below that estimated by the Commission's cost model for the census blocks involved.¹¹ The projected revenue stream is conservatively estimated based on the known level of demand by both the anchor institutions and the general public in the area, combined with the absence of any alternative provider capable of meeting that demand. The successful implementation of RBSC's proposal can be confidently predicted when these favorable financial factors are combined with a technically sound design and management with substantial experience in developing systems of this breadth and complexity.

- B. RBSC's current operations are evidence of its sound technical and operational capabilities

Consistent with its commitment to bring high speed broadband to the Cherokee Tribal Lands, RBSC has designed and constructed two separate fiber loops, North and South. The

¹¹ The Cost Model would provide \$59,780,662 support for the area compared to RBSC's bid of 21% of that amount (\$17,500,648 less a Tribal bid credit of 25%).

Northern Loop was completed in March of 2014 and consists of about 15 miles of 144 fiber cable. The Southern Loop is under construction and consists of about 17 miles of 144 fiber cable.

RBSC anticipates completing construction, testing and activation by February 15, 2015.

At this point in time, RBSC is providing high speed (Gigabit level) broadband service to the following rural anchor institutions on Tribal Lands:

Northern State University (NSU)	500Mbps circuit capable of up to 3000Mbps
Hasting Indian Hospital	100Mbps circuit capable of up to 1000Mbps
Six Healthcare Facilities	100Mbps circuit capable of up to 1000Mbps

In addition, RBSC has submitted through the federal E-Rate System 14 bid proposals for providing high speed broadband services to educational institutions on Tribal lands.

- C. The Tribal Lands should not be denied their best hope for major upgrade to modern service, nor the opportunity to utilize Connect America funding to its best use for lack of an LOC

Although foreclosure on a broadband service provider would require more time and effort to monetize than drawing on an LOC, before the conclusion of the five year build out period, an operating broadband system will exist that can reasonably be expected to be worth substantially more as a going concern than the \$15 million investment in hard assets. The total RBE support payments at this time will have been approximately \$11.25 million, or 75% of the RBSC asset cost. Additional value will accrue to the operating network further increasing the net worth.

This value provides adequate security for the CAF when compared with the benefits to the economy and social well-being of a long underserved population on Tribal Lands. The relief requested here is consistent with, and furthers the purposes of the Tribal lands bidding credit.¹² The adoption of that credit is what made feasible the RBE application that was provisionally

¹² *Experiments Order* at para. 44, 29 FCC Rcd at 8784. The bidding credit is intended to “Recogni[ze] unique challenges in serving Tribal lands....” *Id.* at para. 31, 29 FCC Rcd at 8781.

selected. The Commission should thus balance its interest in fast and low cost recovery of support where conditions are not met with the strong indications that the improved service objectives of the Connect America Fund will be met and exceeded.

A relevant factor in this balance is the substantial reduction in the amount of CAF funds that RBSC would receive as compared to the model-based support that would be available to the ILEC accepting a state-wide commitment. The RBSC Project 1 carries a 10-year model support amount of \$59,780,662. The RBSC bid to build out Project 1 is for support of \$17,500,648, a savings of \$42,280,014, yet the RBSC project, as shown by its Category 1 provisional selection, will provide service far superior to the minimum required for model-based support. Final approval of the RBSC proposal will mean that the 200,000 rural American residents of the Tribal lands in five northeast Oklahoma counties will begin realizing the promise and benefits of broadband 15 months after the initial support payment made to RBSC. There is no comparative metric that can clearly be established, in the alternative, for the price cap carrier and the RBSC business model will not likely be duplicated. The granting of this waiver request will be a major step forward in the efforts of the UKB Cherokee toward self-determination.

D. RBSC's Joint Undertaking with the UKB Cherokee Provides Substantial Additional Assurance that the Program Objectives Will Be Met and the CAF Support Will Not Be Wasted

RBSC and UKB Cherokee have agreed to work together to bring about the benefits of high speed Internet and other broadband services to multiple "anchor institutions," and others within the Tribal lands in the 5-county NE Oklahoma area of Cherokee, Muskogee, Adair, McIntosh, and Sequoyah Counties. The close coordination and sharing of control with the UKB Cherokee means that on a daily basis a substantial, sophisticated tribal organization will have a very particular interest in ensuring that the service is constructed and operated in accordance

with its approved requirements. Further, RBSC intends that at the end of the FCC's Experiment support the UKB Cherokee will have complete control of the Network.¹³ The combination of the experienced management team of RBSC and the strong financial strength of RBSC's equity Partner, AFL Telecom,¹⁴ coupled with the significant control described above, greatly reduces the possibility that RBSC will fail to meet the terms and conditions of the RBE support provided.

Additional assurance that Connect America support will be utilized on the Tribal lands as proposed for the benefit of the residents, businesses and tribal anchor institutions is provided by the ETC process. RBSC filed its request for ETC designation with the Corporation Commission of Oklahoma ("CCO") on March 11, 2014 and amended it on May 20, 2014, far in advance of its provisional selection. RBSC expects the CCO to act on its petition later this month. ETC designation necessarily means that RBSC will be required on an annual basis to convince the CCO that the funds received are being used for their intended purpose.¹⁵ The UKB Cherokee leadership, which is responsible to the tribal members, will have particular incentive to ensure that the PSC is willing and able to make the required certification.

¹³ This sharing of control thus goes well beyond the requirements of Section 54.313(a)(9) for tribal coordination. RBSC will, of course, also ensure that it meets those coordination requirements with respect to the Cherokee Nation.

¹⁴ AFL Telecom, a manufacturer of telecommunications equipment, including fiber optic cable, is a wholly owned subsidiary of Fujikura, Ltd. of Japan. Fujikura has assets of over \$5 Billion.

¹⁵ 47 C.F.R. Sections 54.7, 54.314(a) ("*Certification*. States that desire eligible telecommunications carriers to receive support pursuant to the high-cost program must file an annual certification with the Administrator and the Commission stating that all federal high-cost support provided to such carriers within that State was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. High-cost support shall only be provided to the extent that the State has filed the requisite certification pursuant to this section.")

III Conclusion

RBSC recognizes that the LOC requirement was announced several months ago and that today is the date for filing the commitment letter. RBSC made its difficulty in obtaining a LOC clear in its application which was provisionally selected by the Bureau, but nevertheless undertook, as described above, good faith efforts to re-verify that it could not obtain an LOC on financially feasible terms. RBSC further recognizes the Commission's intent to minimize the time and expense of recovering support that was not used for its intended purpose. However, the overriding public interest purposes, as stated in Sections 1, 254 and 706 of the Act should not be held hostage to administrative efficiency where the price for that efficiency is most certainly the continued lack of Category 1 Broadband on the Tribal Lands in question. The Commission has repeatedly recognized that Tribal Lands are among the most lacking in the country. The Commission is now presented with the choice between a sound deployment plan with a high probability of success and the unacceptable status quo with little likelihood of service improvements to the levels that RBSC will provide. The Commission should find that the Public Interest requires that major improvements for a neglected population outweigh administrative efficiency in resolving a problem with low probability of occurrence.

For the reasons stated above, RBSC requests that the above described waiver be granted.

Respectfully submitted

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Verification

I, Roy Choates, President and General Manager of Rural Broadband Services Corporation, have read the foregoing Request for Waiver of Requirement for Letter of Credit and verify that the facts stated therein are true and correct to the best of my knowledge and belief.

2/3/2015
Date

Roy Choates
Roy Choates
